No. 96-229

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

DAVID M. JORDAN,

Petitioner,

vs.

CARLOS VALDEZ, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR NUECES AND KLEBERG COUNTIES; AND NUECES COUNTY AND KLEBERG COUNTY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS CARLOS VALDEZ AS DISTRICT ATTORNEY FOR KLEBERG COUNTY AND KLEBERG COUNTY

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below.	1
B. Statement of the Facts	2
Summary of the Argument	5
Reasons for Denying the Writ	7
I. Petitioner Has Failed to Articulate a Conflict Between the Lower Courts' Opinions and This Court's Holding in *Carter*. Thus, the Lower Courts Correctly Ruled that Petitioner Was Not Required to be Reinstated Since There Was Sufficient Evidence of "Cause" for His Termination.	7
II. Petitioner Has Failed to Cite a Single Opinion Which Conflicts With the Department of Labor Opinion, *Winfree*, Or the Opinion Articulated by the Fifth Circuit Below. Accordingly, Due to Petitioner's Behavior Prior to Leaving for Military Service, This Court Should Come to the Same Conclusion as the Fifth Circuit and Hold That Petitioner Is Not Entitled to Reinstatement	12
Conclusion	17

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Burkart v. Post-Browning, Inc., 859 F.2d 1245 (6th Cir. 1988) 13

Carter v. United States of America, 407 F.2d 1238 (D.C. Cir. 1968) 6, 7, 9, 10, 12

Coffy v. Republic Steel Corp., 447 U.S. 191 (1980) 13

Cole v. Swint, 961 F.2d 58 (5th Cir. 1992) 13

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, reversed in part*, 339 U.S. 605 (1950) 11

Henry v. Anderson County, Tennessee Office of the Sheriff, 522 F. Supp. 1112 (E.D. Tenn. 1981) 8, 9, 10, 11

Jeffers v. Hanson, 441 So. 2d 283 (La. App. 4 Cir. 1983) 7

King v. St. Vincent's Hospital, 112 S. Ct. 570 (1991) ... 15

Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981), *overruled on other grounds by King v. St. Vincent's Hospital*, 112 S. Ct. 570 (1991) 15

Contents

	Page
Martin v. Capital Cities Media, Inc., 511 A.2d 830 (Pa. Super. 1986)	7
McCormick v. Carnett-Partsnett System, Inc., 396 F. Supp. 251 (M.D. Fla. 1975)	6, 8
Monroe v. Standard Oil Co., 452 U.S. 549 (1981)	5, 13
National Labor Elections Board v. Local Union No. 1229, International Brotherhood of Electrical Workers, 346 U.S. 464 (1953)	7
NLRB v. Federbush Co., 121 F.2d 954 (2nd Cir. 1941)	15
Turner v. Byers, 562 S.W. 2d 507 (Tex. Civ. App. — El Paso 1978, writ ref'd n.r.e.)	7
Weir v. Anaconda Co., 773 F.2d 1073 (10th Cir. 1985)	7
Wimberly v. Labor and Industrial Relations Commission, 479 U.S. 511 (1987)	6, 16
Winfree v. Morrison Incorporated, 762 F. Supp. 1310 (E.D. Tenn. 1990)	12, 16, 17
Statutes Cited:	
38 U.S.C. §§ 2021-2026	1
38 U.S.C. §§ 4301 *et seq.*	1, 5

Contents

Page

38 U.S.C. § 4301(a)(B) 13, 16

38 U.S.C. § 4301(b)(3) 16

Rules Cited:

Federal Rule of Appellate Procedure 28(6) 12

Federal Rule of Civil Procedure 52(a) 12

Other Authority Cited:

VETERAN'S REEMPLOYMENT RIGHTS HANDBOOK (1970) .. 15

APPENDIX

Appendix A — Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas, Corpus Christi Division Entered June 22, 1995 ..... 1a

Appendix B — Final Judgment of the United States District Court for the Southern District of Texas, Corpus Christi Division Entered June 22, 1995 ..... 11a

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Petitioner filed suit on February 4, 1994, in the United States District Court, Southern District of Texas, Corpus Christi Division, against Defendants Grant Jones, Individually; Carlos Valdez as District Attorney for Nueces and Kleberg Counties Texas; Kleberg County; and Nueces County.[1] Petitioner's Original Complaint asserted that Petitioner had been deprived of his rights pursuant to 38 U.S.C. §§ 2021-2026, recodified into 38 U.S.C. §§ 4301 *et seq.*, Veterans Reemployment Rights Act (hereinafter referred to as "the VRRA"). Petitioner sought a court order restoring him to his former position or to a position of like seniority, status and pay pursuant to the VRRA, and judgment against Respondents for damages.

After the close of evidence, the trial court granted judgment in favor of Respondents Carlos Valdez, in his official capacity as district attorney for Kleberg County, and Kleberg County[2] on Petitioner's claims for damages and restoration under 38 U.S.C. §§ 4301 *et seq.*, VRRA.[3] The court also granted judgment for Respondents Carlos Valdez, in his official capacity as district attorney for Nueces County, and Nueces County finding that Respondent Nueces County was not the

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1. Mr. Grant Jones is the former district attorney for Nueces and Kleberg Counties. He was replaced by Mr. Carlos Valdez.

2. Mr. Carlos Valdez as District Attorney for Kleberg County, and Kleberg County will hereafter be referred to as "Respondents."

3. Mr. Grant Jones and Mr. Carlos Valdez, in their individual capacities were dismissed by Petitioner prior to the date of trial.

employer of Petitioner. On or about June 22, 1995, the trial court entered its Findings of Fact and Conclusions of Law, and signed the final judgment in favor of Respondents Carlos Valdez, Kleberg County and Nueces County on June 21, 1995. The final judgment further provided that costs of suit were to be assessed against Petitioner. Petitioner then appealed the district courts decision to the United States Fifth Circuit Court of Appeals.

The Fifth Circuit affirmed the district court's decision by finding: (1) that the VRRA did not require Kleberg County to automatically reinstate him; (2) that Kleberg County had legal cause to terminate him; and (3) that Nueces County was not Petitioner's employer. However, the Fifth Circuit vacated the district court's decision to award costs to the Respondents. Petitioner subsequently filed his Petition for Writ of Certiorari.

B. Statement of the Facts.

The opinion of the Fifth Circuit Court of Appeals correctly sets forth the facts of this case. The opinion accurately depicts the gravity of the Petitioner's actions and the concern and conscientiousness of the Respondents involved in resolving the matter. In the interest of making this brief truly brief, Respondents respectfully direct the Court's attention to the appellate court's opinion.

Pursuant to United States Supreme Court Rule 15.1, Respondents bring the following statement of facts to correct the misstatements contained in the Petitioner's Writ of Certiorari.

On January 21, 1987, district attorney Grant Jones hired Petitioner as a permanent assistant district attorney of the 105th Judicial District of the State of Texas. (R. Vol. 1, p. 2). The

105th Judicial District encompasses Nueces, Kleberg and Kennedy counties in south Texas. *Id.* Petitioner was assigned to work in Kleberg County, where the Commissioner's Court of that county created and funded his job. *Id.* at 2-3. Petitioner, besides being an assistant district attorney, was also a reservist of the United States Armed Forces. *Id.* at 3. During his employment with Kleberg County from roughly January 21, 1987, through October 25, 1990, Petitioner would, biannually, be recalled to active duty as part of his reserve commitment. *Id.* On the occasions of his reserve duty Petitioner would give notice of his departure, leave to fulfill his obligation, and return to work. *Id.* During these periods, it was understood by both Petitioner and Respondents that Petitioner's employment status was to be "leave without pay." *Id.*

On October 25, 1990, the United States Armed Forces called Petitioner to active duty for Operation Desert Shield/ Desert Storm. *Id.* Shortly thereafter Respondents found graphic, offensive, and explicit sexual literature (including hardcore pornographic literature, a pictorial sexual positions book, and a vibrator in the shape of a penis) in Petitioner's office. If that was not disgusting enough, Petitioner also kept pictures, from a closed file, of a partially nude murder victim. (Supp. R. Vol. 1, pp. 95, 102). Some of the materials which were admitted at trial showed both heterosexual and homosexual, oral-genital contact and intercourse. (R. Vol. 1, p. 3). As the trial court so eloquently stated; "[i]t can best be described as base smut." *Id.* This "smut" was unfortunately first discovered by two (2) secretaries while they were cleaning and organizing Petitioner's office for a substitute assistant district attorney. *Id.* 3-4. Amazingly enough, there was so much pornography that when boxed, it exceeded six (6) feet in height. (Supp. R. Vol. 1, p. 207). Possibly, even more surprising was the fact that the volume of materials was exceeded only by its filth. *See* Sealed Exhibits.

The majority of the pornography in Petitioners' office — with the exception of that which Petitioner purchased himself — was received through the Kleberg County District Attorney's official business post office box address in Kingsville, Texas. (R. Vol. 1, p. 4). Upon investigation, it became apparent that Petitioner had been receiving these materials, for his own personal use, through the mail since late 1987. *Id.*

Upon the discovery of this pornographic material, Grant Jones, the district attorney at that time, determined that such conduct was a legitimate cause for termination. (Supp. R. Vol. 2, p. 48). Mr. Jones' conclusion was based on his concern of a possible lawsuit under Title VII of the Civil Rights Act (1964) after receiving complaints from both female secretaries in the Kleberg office. More importantly, Mr. Jones was keenly aware of the negative effect Petitioner's conduct could have on the public's image of the district attorney's office as an effective and credible arm of law enforcement. (R. Vol. 1, p. 4; Supp. R. Vol. 1, pp.185-89; Supp. R. Vol. 2, pp. 109-10).

Petitioner subsequently returned to Corpus Christi and informed Mr. Jones by letter that he wished to resume his duties as assistant district attorney in Kleberg County. *Id.* Although he had decided not to reinstate Petitioner, Mr. Jones along with Mr. Roy Hudspeth (the first assistant district attorney) decided they would meet with Petitioner so he could explain his past actions. (R. Vol. 1, pp. 4-5). While Mr. Jones would not have easily restored Petitioner to his former position, he was willing to hear any explanation why Petitioner kept this disgusting material in his office and reconsider his decision. *Id.* at 5. He delegated the duty of holding the meeting to Mr. Hudspeth, who scheduled a meeting with Petitioner and explained to him its purpose. *Id.* When Petitioner arrived at the scheduled time, he declined to discuss the issue, and departed after handing Mr.

Hudspeth a self-drafted memorandum on the Veteran's Reemployment Rights Act. *Id.*

Thereafter, Mr. Jones, by letter, officially terminated Petitioner for receiving pornographic material through the official business post office box of the district attorney and the hoarding of such materials at the district attorney's office. *Id.* (Supp. R. Vol. 1, pp. 149-50). The letter made it clear that Petitioner was not being terminated because of his military obligation. (Supp. R. Vol. 1, pp. 149-50). Subsequent to his termination Petitioner sought redress by filing suit in district court.

SUMMARY OF THE ARGUMENT[4]

The courts below correctly interpreted the Veteran's Reemployment Rights Act in concluding that Petitioner was justly terminated for cause prior to reinstatement. 38 U.S.C. §§ 4301 *et seq.* The lower courts' interpretation must be examined in light of the legislative intent of Congress, as well as, the policy concerns articulated previously by this Court. It has been adduced that the manifest purpose of the VRRA is to insure that veterans and reservists are not subject to discrimination by their employers because of their military duty. *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981).

Petitioner, however, would have this Court read the statute to suggest that he is guaranteed reinstatement regardless of the facts and circumstances existing independent of his military duty. (Supp. R. Vol. 1, pp. 35-39). Such is not the case. The protection of the statute is based upon the ordinary and accepted standards of personal conduct and performance of all

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4. Respondents have opted to file a "Summary of the Argument" since Petitioner failed to provide the Court with this essential material.

employees. *McCormick v. Carnett-Partsnett System, Inc.*, 396 F. Supp. 251 (M.D. Fla. 1975). Petitioner, through his use of the official post office box of the district attorney for the receipt of pornographic literature and the storage of such at his office, exceeded the bounds of ordinary acceptable standards of personal conduct. (Supp. R. Vol. 2, p. 24). Grant Jones, as well as the current district attorney Carlos Valdez, testified that any employee would have been terminated for the conduct in which Petitioner engaged. (Supp. R. Vol. 2, pp. 29, 92). Moreover, to require Respondents to reinstate Petitioner for any period of time, no matter how minute, would be considered preferential treatment which the statute does not impose on the employer. *See Wimberly v. Labor and Industrial Relations Commission*, 479 U.S. 511, 517 (1987). Accordingly, the lower courts' interpretation of the VRRA allowing Petitioner to be terminated for cause prior to reinstatement should be affirmed.

Petitioner further argues that his termination was not for cause since he was not given notice that the hoarding of pornographic literature in the district attorney's office was not allowed. (Appellant's Brief, p. 30). Petitioner, in order to establish the notice requirement under cause, relies upon *Carter v. United States of America*, 407 F.2d 1238 (D.C. Cir. 1968). The court in *Carter* determined that discharge for cause would be upheld if it met two criteria of reasonableness: (1) that it is reasonable to discharge an employee for certain conduct; and (2) that the employee had fair notice, express or fairly implied, that such conduct would be a basis for discharge. *Id.* at 1244. Regardless of the fact that Petitioner had received express notice, any individual with any moral judgment should have realized that such things as sex, drug paraphernalia, and hardcore pornography do not belong at the office, much less a public office. (Supp. R. Vol. 2, p. 128; Supp. R. Vol. 2, p. 94). Therefore, this Court should affirm the lower courts' finding that there was sufficient cause to discharge Petitioner.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO ARTICULATE A CONFLICT BETWEEN THE LOWER COURTS' OPINIONS AND THIS COURT'S HOLDING IN *CARTER*. THUS, THE LOWER COURTS CORRECTLY RULED THAT PETITIONER WAS NOT REQUIRED TO BE REINSTATED SINCE THERE WAS SUFFICIENT EVIDENCE OF "CAUSE" FOR HIS TERMINATION.

Petitioner alleges that the Fifth Circuit's opinion in dealing with the "cause" issue creates a conflict with the court's holding in *Carter v. United States of America*, 407 F.2d 1238 (D.C. Cir. 1968), and the VRRA. Petitioner argues that Kleberg County could not terminate him for cause based on his receipt of sexually explicit materials because he was not on notice that his behavior was prohibited by Respondents.

"Cause" has been defined as a shortcoming in performance which is detrimental to the discipline and efficiency of the employer. *Weir v. Anaconda Co.*, 773 F.2d 1073, 1080 (10th Cir. 1985). Cause is also incompetency or inefficiency or some other cause within the control of the employee which prohibits him from properly completing his task. *Id.* Moreover, a discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory. *Id.*; *see also Martin v. Capital Cities Media, Inc.*, 511 A.2d 830 (Pa. Super. 1986); *Jeffers v. Hanson*, 441 So. 2d 283 (La. App. 4 Cir. 1983); *Turner v. Byers*, 562 S.W. 2d 507 (Tex.Civ.App.-El Paso 1978, writ ref'd n.r.e.); *National Labor Elections Board v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953) (all the above referenced cases state the proposition that the employee was rightfully terminated for doing injury to his employer's business).

For example, in *McCormick v. Carnett-Partsnett System, Inc.*, plaintiff was an employee of defendant until he re-enlisted with United States Air Force on August 23, 1972, and served until June 1, 1973, at which time he was honorably discharged. 396 F. Supp. 251 (M.D. Fla. 1975). Upon his return to civilian life his application for reemployment with the defendant was denied. Plaintiff turned to the Department of Labor for assistance, and after negotiations, plaintiff was rehired. Upon being restored, the plaintiff was subsequently fired for cause due to work related conduct which included excessive absenteeism, an extraordinary amount of time in the bathroom, personal telephone calls, and improper clothing. *Id.* at 255-56. The court held that although the employee may have assumed that the right to reinstatement was a guarantee and that any behavior was to be tolerated, such is not the case. *Id.* at 256. The protection of the statute is based upon the veteran's compliance with the ordinary and accepted standards of personal conduct and performance of all employees. *Id.* at 256.

Petitioner attempts to stand in the shoes of McCormick and declare that he is guaranteed reinstatement regardless of the fact that he was on ***notice*** that he would be fired if the hardcore pornography which he was receiving was ever found. Again, such is not a reasonable application of the statute.

In *Henry v. Anderson County, Tennessee Office of the Sheriff*, the plaintiff sought, among other things, reinstatement to his former position after the Sheriff's termination of him upon returning from his initial active duty with the United States Army Reserve. 522 F. Supp. 1112 (E.D. Tenn. 1981). The court held that the Sheriff's termination of the plaintiff was for cause since the deputy failed to answer a time check, was caught reading a novel on duty and for using profane language to defame the Sheriff's department in front of the jailor. *Id.* at 1114. Additionally the court noted that the VRRA does not

require a court to disregard those aspects of the basic employment relationship which would make continued or ***renewed*** employment unreasonable. *Id.* at 1115. Therefore, it should be safe to assume that if profane language used to defame one's employer was sufficient to fire a reservist for cause, surely the moral standards of society have not deteriorated to the point where maintaining a six (6) foot stack of hardcore pornographic materials and a sexual device for personal use would not amount to cause.

Rather than address the hardcore pornographic literature and the sexual device which Petitioner stored in his office, he alternatively argues that cause did not exist since he was not given notice that such materials were prohibited. In order to establish this notice requirement under the definition of cause, Petitioner relies upon the decision in *Carter*. 407 F.2d 1238 (D.C. Cir. 1968). In *Carter*, where the court vacated and remanded the trial court's summary judgment holding that an employee of the Federal Bureau of Investigation was entitled to a trial on the question of whether his conduct of engaging in heterosexual petting and sleeping with a woman, without sexual intercourse, was understood to be outside ordinary expected standards of professional conduct. *Id.* The court in *Carter* determined that discharge for cause would be upheld if it met two criteria of reasonableness: (1) that it is reasonable to discharge employees of certain conduct; and (2) that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. *Id.* at 1244.

Since Petitioner failed to address the first element under *Carter*, it will be assumed that if Petitioner had such notice then the materials found in his office would amount to cause justifying his termination. Even if such issue was addressed, the case law and facts set forth above should be sufficient to

satisfy the first prong of *Carter's* reasonableness test.[5] Therefore, the question is whether Petitioner received notice either expressly or implicitly that such materials were not permitted in his office. Former district attorney Grant Jones remembers establishing a "hardcore" policy that no sexually implicit materials were to be brought into the office. (Supp. R. Vol. 2, p. 28). Nevertheless, *Carter* specifically withheld requiring that notice be expressed:

> The ultimate issue here, which is interwoven with such questions of fact, is whether the conduct was or should have been known to the employee to be prohibited by the employer.

407 F.2d at 1246.

It should be obvious to any individual with good judgment that such things as sex, drug paraphernalia, hardcore pornography, and sexual devices do not belong at the office, much less a public office. Unfortunately, it appears that this case is before the Court for no other reason than Petitioner's lack of moral judgment. (Supp. R. Vol. 1, p.128; Supp. R. Vol. 2, p. 94). Consequently, this Court in *Carter* held behavior which is immoral, such as Petitioner's, can be "cause" for discharge. 407 F.2d at 1245-46.

Although the court in *Henry* failed to comment on whether the Sheriff was a publicly elected official, or whether such fact had any influence on whether the employee's misconduct amounted to cause, such facts are relevant in the case at bar. 522

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5. Despite Petitioner's protestations, it cannot be seriously disputed that receipt and maintenance of this kind of base smut by a public official at his public office would amount to just cause for termination of employment.

F. Supp. 1112. A district attorney in the State of Texas is a publicly elected official. His credibility is determined directly from the public's perception of him, as well as, his staff. When an individual takes a position as an assistant district attorney, that individual relinquishes some freedoms which other employees may enjoy in other professions. Petitioner, as a prosecutor, was required to have credibility not only to reflect favorably upon his employer, but also when standing in front of juries. (Supp. R. Vol. 2, p. 34). It is not difficult to imagine how oxymoronic it would be if Petitioner was required to one day prosecute an individual for obscene literature. Moreover, in this day of sexual harassment awareness the district attorney would be buying a lawsuit if he placed Petitioner in his old job in a small intimate office, alone, with two young female staff members. It should be obvious and clear that Petitioners receipt of pornography through the district attorney's post office box, and possession of a vibrator, and a "mass collection" of base smut at the district attorney's office would amount to notice and cause.

Furthermore, both the trial court and the court of appeals found that Petitioner was well aware that if anyone at the district attorney's office discovered his collection of sexually explicit materials, he would be terminated. Additionally, the lower courts findings of cause rested largely on evidentiary findings, and should therefore be left undisturbed. Evidentiary findings by a trial court, which are affirmed on appeal, present no issue deserving of this Court's attention. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, reversed in part*, 339 U.S. 605 (1950) ("A court of law, such as this Court is, rather than a court of correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

Finally, Petitioner now raises for the first time on appeal that the Fifth Circuit applied the wrong standard of review. It was Petitioner's burden on appeal to state to the Fifth Circuit the proper standard of review before each point of error. Fed. R. App. P. 28(6). For each issue which Petitioner briefed he ***correctly*** stated that the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) should have applied. Therefore, Petitioner should be estopped from making any contention that the Fifth Circuit applied the wrong standard of review or alternatively, such error has been waived. Accordingly, the courts below entered a decision which was consistent with this Court's holding in *Carter* and the congressional intent behind the VRRA.

II.

PETITIONER HAS FAILED TO CITE A SINGLE OPINION WHICH CONFLICTS WITH THE DEPARTMENT OF LABOR OPINION, *WINFREE*, OR THE OPINION ARTICULATED BY THE FIFTH CIRCUIT BELOW. ACCORDINGLY, DUE TO PETITIONER'S BEHAVIOR PRIOR TO LEAVING FOR MILITARY SERVICE, THIS COURT SHOULD COME TO THE SAME CONCLUSION AS THE FIFTH CIRCUIT AND HOLD THAT PETITIONER IS NOT ENTITLED TO REINSTATEMENT.

The Fifth Circuit's decision in the case at bar is consistent with congressional intent, as well as, prior holding of various federal courts of appeal, including this Court. The lower courts correctly found that the manifest purpose of the VRRA, which is to be liberally construed in favor of the reservist, is to insure that a veteran or reservist who is forced to be absent from his (or her) civilian employment by reason of military leave will not be penalized upon his return because of his military status. *See*

Monroe, 452 U.S. 549; *Cole v. Swint*, 961 F.2d 58, 59 (5th Cir. 1992) (citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980)).

Petitioner argues that § 4301(a)(B) grants returning veterans a mandatory right of reinstatement regardless of whether they left their jobs in good standing. In the alternative Petitioner argues that even if he did not have a mandatory right of reinstatement, he was not on notice that his conduct was prohibited; therefore, Kleberg County did not have sufficient cause to terminate him. Petitioner's only complaint with the Fifth Circuit's opinion is that they failed to construe the VRRA as liberally as other courts. Respondents believe that Petitioner's contention is that because the lower courts have failed to rule in his favor, they must therefore not be reading the applicable statutes liberally enough.

Unfortunately, after a three day trial and appeal to the Fifth Circuit Court of Appeals, Petitioner still does not realize the true intent of the VRRA. Congress' clear intent was to protect reservists and veterans from unnecessary discrimination arising from military duty; however, nothing in the legislative history or the case law indicate that a veteran should be immunized indiscriminately from all responsibility to his employer. *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (6th Cir. 1988). In fact, "[t]he Veteran's Act was drafted with the intent to shield a serviceman from discrimination by his employer, not to arm him with a sword to punish his employer for some perceived wrong unconnected to his status." *Id.* at 1250.

Petitioner attempts to create a conflict among the cases cited by the district and appellate courts on the ground that those cases dealt with employees who were first reinstated and then fired for cause. Petitioner's argument is based on 38 U.S.C. § 4301(a)(B) which provides that:

> In the case of any person who is inducted into the Armed Forces of the United States under the Military Service Act . . . and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such . . . service, and (1) receives an [honorable discharge] and (2) makes application for reemployment within ninety days after such person is relieved from such . . . service . . . (B) if such position was in the employ of a State, or political subdivision thereof, . . . such person shall:
>
> > (i) if still qualified to perform the duties of such position . . . be restored by such employer or the employers successor in interest to such position or to a position of like seniority, status, and pay; unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

Petitioner would have the Court read this single statutory provision in isolation so that the word "shall" would imply that every veteran, regardless of the circumstances in which he left for service, would be entitled to automatic reinstatement. His argument must fail. When interpreting statutory language the cardinal rule must be followed that a statute is to be read as a whole for

> words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpret

> the other, but all in their aggregate take their purport from the setting in which they are used.

King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 (1991) (quoting *NLRB v. Federbush Co.,* 121 F.2d 954, 957 (2nd Cir. 1941). When the VRRA is examined as a whole, Petitioner's misinterpretation becomes apparent. The legislative intent of the statute was to protect returning veterans and reservists from discrimination, not to give them a windfall. *See Lee v. City of Pensacola,* 634 F.2d 886, 888 (5th Cir. 1981), *overruled on other grounds by King v. St. Vincent's Hospital,* 112 S. Ct. 570 (1991). To carry Petitioner's argument to its logical end would require an employer in some instances to reinstate a convicted murderer or embezzler.[6] Under such fact scenarios, to require the employer to reinstate the veteran for any period of time would be considered preferential treatment which the statute

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6. The Department of Labor gave the following example:

> Branch Manager C is drafted into the Army from his position with R Finance Company. A month later, an audit clearly establishes that C had systematically embezzled about $18,000 of R's funds over a period of time.
>
> On returning from military service, C will not be considered qualified to perform the duties of his pre-service position or any other position with R Company which involves access to its funds. For that matter, since discharge is a usual and reasonable penalty in such situations, C will not have any reemployment rights at all with R. Mere unsubstantiated suspicion of embezzlement, however, would not justify a denial of reinstatement.

VETERAN'S REEMPLOYMENT RIGHTS HANDBOOK (1970), at 7-36 (Example 3).

does not impose on the employer. *See Wimberly v. Labor and Industrial Relations Commission,* 479 U.S. 511, 517 (1987). Grant Jones, as well as, the current district attorney Carlos Valdez, testified that any employee would have been terminated for the same conduct in which Petitioner engaged. (Supp. R. Vol. 2, pp. 29, 92). Consequently, if Respondents had been aware of this conduct before Petitioner left for reserve duty, he would have been terminated for cause. *Id.* Therefore, similar to the analogies above, to permit Petitioner restoration of his duties would extend to him a preferential right of hiring that this Court and other federal courts have held that the statute does not provide. Therefore, Petitioner possesses no right to restoration under § 4301(a)(B).

While this is apparently a case of first impression for this Court under these particular facts, such facts have been dealt with before. In *Winfree v. Morrison Incorporated,* the plaintiff enlisted in the Marine Corps Reserves, and subsequent to such enlistment his performance as an employee went steadily downhill. 762 F. Supp. 1310 (E.D. Tenn. 1990). The defendant knew the plaintiff was going to the Marines and rather than fire him, just hoped that he would not come back. *Id.* at 1312. Upon completion of his duty the plaintiff returned seeking to be restored to his previous position at which point the defendant sought advice from the Department of Labor as to whether it was required to reemploy the plaintiff. *Id.* The defendant received advice that it did not have to reemploy the plaintiff, and acted in accordance. *Id.* The plaintiff filed suit claiming reinstatement under what is now §§ 4301(a)(B) and 4301(b)(3). The court reasoned that since the defendant's failure to reemploy the plaintiff was not causally related to his service in the military, it was not required to rehire plaintiff. *Id.* at 1313. The Tennessee court therefore read the statute as a whole rather than in isolated parts with the intent of upholding the policy concerns of Congress and this Court. Petitioner has failed to

cite this Court to a single opinion which conflicts with the Department of Labor opinion, *Winfree* or the opinion articulated by the Fifth Circuit below. Accordingly, due to Petitioner's behavior prior to leaving for military service, this Court should come to the same conclusion as the Fifth Circuit and hold that Petitioner is not entitled to reinstatement.

CONCLUSION

The case at bar is a single incident which has no bearing on the development of the law in this area. The various circuits which have dealt with interpreting the VRRA have consistently applied the intent of congress and the decisions of this Court to create a uniform body of law. The Fifth Circuit's opinion in this case is consistent with that body of law. Therefore the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION ENTERED JUNE 22, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-94-038

DAVID M. JORDAN

V.

CARLOS VALDEZ, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR NUECES AND KLEBERG COUNTIES, NUECES COUNTY AND KLEBERG COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff David M. Jordan was a reserve officer called to active duty for Operation Desert Storm. After he was honorably discharged, he returned to resume his former position as an assistant district attorney of the 105th Judicial District of the State of Texas. The district attorney refused to permit it because, while the plaintiff was on active duty, the district attorney's staff found very explicit sexual reading material throughout the district attorney's office assigned to the plaintiff. The plaintiff sued defendants for backpay and reinstatement alleging a violation of the Veteran's Reemployment Rights Act ("VRRA" or "the Act"), 38 U.S.C. § 4301 *et seq.* After trial to the Court, the Court makes these findings of fact. Fed. R. Civ. P. 52(a).

Appendix A

FINDINGS OF FACT

1. On January 21, 1987, District Attorney Grant Jones hired the plaintiff as a permanent assistant district attorney of the 105th Judicial District of the State of Texas. The 105th Judicial District encompasses Nueces, Kleberg, and Kenedy counties in south Texas. The Commissioner's Court of the county in which the assistant district attorney is to serve creates and funds the assistant's position, and provides employment benefits. Kleberg County created the position and paid the plaintiff's salary and benefits; Nueces County did not. Mr. Jones assigned the plaintiff to work in the Kleberg County office and where he worked on Kleberg County cases. During his tenure, the plaintiff worked on an insignificant number of Nueces County cases.

2. The plaintiff was a reservist of the United States Armed Forces. Between January 21, 1987 and October 25, 1990, the plaintiff, as part of his reservist commitment, would be called to active duty on a bi-annual basis. On the occasions of his reserve duty, the plaintiff would give notice of his departure, leave to perform his duty, and return to resume his work. Another attorney would cover his work on his cases. The plaintiff did not quit and get rehired, nor was he ever fired and then rehired. During these periods, both the defendants and the plaintiff considered the plaintiff's employment status to be "leave without pay."

3. On October 25, 1990, the United States Armed Forces called the plaintiff to active duty for Operation Desert Shield/ Desert Storm. The plaintiff's tour of duty did not exceed four years. During this time, voters elected defendant Carlos Valdez district attorney to succeed Grant Jones as district attorney.

Appendix A

4. Shortly after the plaintiff left for Desert Shield/Desert Storm, the defendants found exceedingly sexually explicit reading material and graphic pictorial advertisements to purchase XXX-rated videotapes in the plaintiff's office. The materials, some of which were admitted at trial, showed oral-genital contact, homosexual oral-genital contact, and graphic pictures of heterosexual and homosexual intercourse. It can best be described as base smut. Two secretaries employed by Kleberg County and who worked in the Kleberg County office found the material as they were clearing the plaintiff's disheveled office so a substitute assistant district attorney could use the Kleberg County office to handle the plaintiff's case load while he was on duty.

5. With the exception of the material the plaintiff purchased himself, the smut - i.e. pictorial advertisements and offers to sell sexually explicit videos were mailed to the Kleberg County District Attorney's official business post office box address in Kingsville, Texas. The plaintiff had been receiving these materials through the mail before he left for Desert Storm, since late 1987 or 1988. The plaintiff admits that the materials the defendants discovered were for his personal use and were not related to any work he had at the Kleberg County D.A.'s office.

6. Grant Jones decided that this conduct was legitimate cause for termination. Mr. Jones knew about the developing Title VII hostile work environment area, and believed that the materials found in the plaintiff's office could subject the defendants to Title VII hostile work environment liability. He was troubled about the public's image of the district attorney's office as an effective and credible arm of law enforcement. The plaintiff was using the district attorney's postal address for receipt of the material.

7. Meanwhile, in March of 1991 and while on active duty, the plaintiff returned to Corpus Christi and contacted Mr. Jones. Mr. Jones informed him that the defendants had discovered the pornographic material and suggested that the plaintiff resign quietly and begin to look for another job. On January 27, 1992, the plaintiff informed Mr. Jones by letter that he wished to resume his duties as assistant district attorney in Kleberg County. Except for his poor judgment in this matter, the plaintiff was qualified to perform the duties of his prior position.

8. Although Mr. Jones had decided not grant the plaintiff's wish to resume his duties, Roy Hudspeth, the first assistant district attorney, prevailed on Mr. Jones to meet with the plaintiff and discuss the matter. While Mr. Jones would not easily have restored the plaintiff to the position, Mr. Jones was apparently willing to hear any explanation as to why the plaintiff kept these materials in his office and reconsider his decision. He delegated the duty of holding the meeting to Mr. Hudspeth. Mr. Hudspeth scheduled the meeting with the plaintiff and explained its purpose. When the plaintiff arrived at the scheduled time, he declined to discuss the issue. He only handed Mr. Hudspeth a self-drafted memorandum of law on the Veteran's Reemployment Rights Act and then departed. He refused the opportunity to explain his behavior.

9. By letter dated February 5, 1992, Mr. Jones officially terminated the plaintiff because the plaintiff maintained these materials at the district attorney's office and because he received the materials through the official business post office box address of the district attorney. The Court finds that the plaintiff's status as a veteran or as a reservist played absolutely no role in Mr. Jones' decision that the plaintiff should not be Kleberg County's assistant district attorney.

10. The Court finds that the plaintiff knew that if anyone discovered his collection, he could be fired. He knew that his actions were not within those reasonably and ordinarily accepted standards of personal conduct expected by employees in a public district attorney's office.

11. Kleberg County was the plaintiff's exclusive employer.

CONCLUSIONS OF LAW

1. The Court possess subject matter jurisdiction under 28 U.S.C. § 1331.

2. 38 U.S.C. § 4301 provides veterans certain rights, and these rights are extended to reservists under 38 U.S.C. §§ 4301(b)(3) and 4304(b)(2). *See e.g., Gulf States Paper Co. v. Ingram,* 811 F.2d 1464, 1468 (11th Cir. 1987). The VRRA is to be construed liberally in favor of the reservists. *Cole v. Swint,* 961 F.2d 58, 59 (5th Cir. 1992) (citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 100 S. Ct. 2100, 2104, 65 L.Ed.2d 53 (1980)).

3. When read together, the Act provides two separate protections to reservists. The first protection is found in 38 U.S.C. § 4301(a)(2)(B) which provides that:

> In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act . . . and who leaves a position (other than a temporary position) in the employer of any employer in order to perform such . . .

> service, and (1) receives [an honorable discharge] and (2) makes application for reemployment within ninety days after such person is relieved from such . . . service . . .
>
> > (B) if such position was in the employ of a State, or political subdivision thereof, . . . such person shall —
> >
> > > (1) if still qualified to perform the duties of such position . . . be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay;
> >
> > * * *
>
> unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

The reservist restored under this section of the statute "shall not be discharged from such position without cause within one year after such restoration." 38 U.S.C. § 4301(b)(1)(A).

4. The second protection is found at 38 U.S.C. § 4301(b)(3), which reads:

> Any person who seeks or holds a position described in [4301(a)(2)(B)] shall not be denied hiring, retention in employment, or

> any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

The additional protection found in Section 4301(b)(3) continues for so long as the reservist is associated with a reserve unit of the Armed Forces. In *Monroe v. Standard Oil Co.*, the Supreme Court observed that Congress provided protection to reservists under Section 4301(b)(3) for "the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, *motivated solely by reserve status.*" 452 U.S. 549, 559, 101 S.Ct. 2510, 2516, 69 L.Ed.2d 226 (1981) (emphasis added).

5. In reaching its decision, the Court exclusively relies upon the right to restoration provisions of Section 4301(a)(2)(B). If Section 4301(b)(3) applied, the plaintiff would not recover its protection because the defendant's failure to allow plaintiff to resume his work was not based on the plaintiff's reserve status. *Monroe*, 452 U.S. at 559, 101 S.Ct. at 2516.

6. Despite Congress's intent to provide reservists a mandatory right of reinstatement, the reservist is not indiscriminately immune from all responsibility to his employer. *Burkart v. Post-Browning, Co.*, 859 F.2d 1245, 1247 (6th Cir. 1988). The Court concludes that the mandatory right of reinstatement contained in 38 U.S.C. § 4301(a)(2)(B) applies only to reservists who have left the employer in good standing — not those reservists whose conduct, if disclosed to the employer, would have caused their termination prior to being called for duty. By implementing the VRRA, Congress

intended to afford reservists "the same treatment afforded their co-workers without military obligations. . . ." *Monroe v. Standard Oil Co.*, 452 U.S. 549, 560, 101 S.Ct. 2510, 2517 (1981). The statute does not impose on an employer a "responsibility to provide preferential treatment." *Id.* at 562, 101 S.Ct. at 2518. *See also Wimberly v. Labor and Indus. Relations Com'n*, 479 U.S. 511, 517, 107 S.Ct. 821, 825, 93 L.Ed.2d 909 (1987). "If a non-reserve employee in [the employee's position] would be terminated for the same conduct, [the employee's] reserve status cannot insulate him. If, on the other hand, a non-reserve employee would not be terminated for the same conduct, it becomes obvious that the reasons given for the termination were pretextual." *Burkart v. Post-Browning Co.*, 859 F.2d 1245, 1248 (6th Cir. 1988). Grant Jones, as well as the current district attorney Carlos Valdez, testified that any employee would have been terminated for the same conduct upon which the plaintiff engaged. The plaintiff would not have left the district attorney's office for reserve duty in good standing had the defendant been aware of the plaintiff's conduct. To permit plaintiff the restoration of his duties would extend to a plaintiff a preferential right of hiring that the Supreme Court and other courts have held that the statute does not provide. Therefore, the plaintiff possesses no right of restoration under 38 U.S.C. § 4301(a)(2)(B).

7. The plaintiff's reserve status had absolutely nothing to do with the employer's failure to reinstate the plaintiff. *Burkart*, 859 F.2d at 1248; *Clayton v. Blachowske Truck Lines, Inc.*, 640 F. Supp. 172, 174 (D. Minn. 1986), *aff'd per curiam on basis of district court opinion*, 815 F.2d 1203, 1205 (8th Cir. 1987) *Weber v. Logan County Home for the Aged*, 623 F. Supp. 711, 714 (D.N.D. 1985), *aff'd*, 804 F.2d 1058 (8th Cir. 1986). In the instant case, there is no record of hostility to the plaintiff's

reserve status. In the past, as well as in the case at bar, the defendant respected the plaintiff's rights under 38 U.S.C. § 4301(b)(3).*See Winfree v. Morrison, Inc.*, 762 F. Supp. 1310, 1313 (E.D. Tenn. 1990).

8. Just like the plaintiff in *McCormick v. Carnett-Partsnett Systems, Inc.*, 396 F. Supp. 251, 256 (M.D. Fla. 1975), the plaintiff appears to believe his conduct is insulated from reproach simply because he is a reservist. As explained by the district court in *McCormick* and implied by the Supreme Court in *Monroe*, 452 U.S. at 560, 101 S. Ct. at 2517, and *Wimberly*, 479 U.S. at 517, 107 S.Ct. at 825 this is not the law:

> Plaintiff seems to have assumed that the right to reinstatement is a guarantee that any behavior on the job must be tolerated. This is obviously not the case; the protection of the statute is based upon the veteran's compliance with the reasonable and ordinarily accepted standards of personal conduct and performance of duty of all employees.

McCormick, 396 F. Supp at 256. To hold otherwise would afford the plaintiff the preferential treatment that the Supreme Court and other courts have held the statute does not provide. Under circumstances such as these, the reservist is not entitled to mandatory and automatic reinstatement as the statute might otherwise permit.

9. Because Kleberg County was the plaintiff's exclusive employer, Nueces County is not liable under the VRRA.

Appendix A

10. Defendants Valdez and Kleberg County are free from liability under VRRA.

ORDERED this 21 day of June, 1995.

s/ H.W. Head, Jr.
H.W. HEAD, JR
UNITED STATES DISTRICT JUDGE

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION ENTERED JUNE 22, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-94-038

DAVID M. JORDAN

V.

CARLOS VALDEZ, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR NUECES AND KLEBERG COUNTIES, NUECES COUNTY AND KLEBERG COUNTY

FINAL JUDGMENT

The Court hereby renders final judgment in favor of defendants Carlos Valdez, Kleberg County, and Nueces County, and orders that plaintiff take nothing on the above entitled and numbered suit. Costs are assessed against plaintiff.

ORDERED this 21 day of June, 1995.

s/ H.W. Head Jr.
H.W. HEAD, JR.
UNITED STATES DISTRICT JUDGE